



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2013

Ms. Sara Abbott McEown
Counsel for the Fort Worth Transportation Authority
Jackson Walker LLP
901 Main Street, Suite 6000
Dallas, Texas 75202

OR2013-17547

Dear Ms. McEown:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 501766.

The Fort Worth Transportation Authority (the "authority"), which you represent, received two requests from the same requestor for information pertaining to Request for Proposal 13-T032. The first request seeks the evaluator scorecard for the submitted proposals. The second request seeks the winning proposal. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample of information.¹

Section 552.103 of the Government Code provides, in relevant part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

This office has long held "litigation," for purposes of section 552.103, includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588.

To demonstrate litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see also*

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336; hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open

Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

The authority received the first request for information on July 19, 2013. You state, and submit documentation showing, that on July 22, 2013, the requestor submitted a letter in protest of the solicitation at issue. You explain that although the protest letter was not submitted until after the first request, the first request included the word “protest.” Accordingly, you claim the authority reasonably anticipated litigation on the date it received the first request for information. Additionally, you state that on August 2, 2013, prior to the authority’s receipt of the second request for information on August 30, 2013, the authority issued a decision on the protest pursuant to the administrative remedies outlined in the authority’s procurement policy, and on August 5, 2013, the requestor filed an appeal of this ruling to the authority’s president/executive director. Furthermore, you explain that if the ongoing appeal is not resolved, the protest may result in a contested case hearing pursuant to the APA, as set forth in article 10 of the authority’s procurement policy. You claim the information submitted in response to the second request is related to the pending and anticipated litigation.

Upon review, we find you have not provided this office with evidence the opposing party had taken any affirmative steps toward litigation prior to the date the authority received the first request for information. *See* Gov’t Code § 552.301(e); ORD 331. Accordingly, we find you have failed to demonstrate litigation was reasonably anticipated when the authority received the first request for information on July 19, 2013. *See* Gov’t Code § 552.103(c) (litigation must be pending or reasonably anticipated at the time the governmental body receives the request for information). As such, none of the information you have submitted as responsive to the first request may be withheld under section 552.103. As you raise no other exceptions to the disclosure of this information, it must be released. However, based on your representations and our review, we find you have demonstrated the information responsive to the second request is related to the litigation that was pending and reasonably anticipated at the time the authority received the second request for information. Therefore, we find the authority may withhold the information responsive to the second request under section 552.103 of the Government Code.³

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of

Records Decision No. 288 (1981).

³As our ruling is dispositive for this information, we need not address your remaining argument against disclosure of this information.

section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the authority must release the information responsive to the first request. The authority may withhold the information responsive to the second request under section 552.103 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/ag

Ref: ID# 501766

Enc. Submitted documents

c: Requestor
(w/o enclosures)